In the Supreme Court

OF THE

United States

Supreme Court, U. S.
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OCTOBER TERM, 1971

No.

PAUL LORIN KANTNER, CLAUDE ERNEST WINTER and DAVID ALLEN NOWELL, *Petitioners,*

vs.

STATE OF HAWAII, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI to the Supreme Court of Hawaii

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vs.

STATE OF HAWAII, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI to the Supreme Court of Hawaii

Petitioners Paul Lorin Kantner, Claude Ernest Winter and David Allen Nowell, respectfully pray that a writ of certiorari issue to review the judgment of the Supreme Court of Hawaii entered on February 28, 1972, rehearing denied on February 25, 1972, affirming the judgment and sentence entered on June 2, 1970 and the denial of the Application for Writs of Habeas Corpus on March 31, 1970 by the Circuit Court of the First Judicial Circuit of the State of Hawaii; an amended petition for rehearing and motion to stay issuance of mandate was denied by the Supreme Court of Hawaii on April 10, 1972 without comment in a per curiam ruling.

OPINION BELOW

The opinion of the Supreme Court of Hawaii is reported at 493 P.2d 306, and is set out in Appendix A together with a copy of the order denying rehearing entered on February 25, 1972 (Appendix B) and the order denying amended petition for rehearing and motion to stay issuance of the mandate entered on April 10, 1972 (Appendix C).

JURISDICTION

The judgment of the Supreme Court of Hawaii was rendered and entered on February 28, 1972. The amended petition for rehearing was denied on April 10, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(3).

QUESTION PRESENTED

Whether the legislative classification and regulation of marijuana as a narcotic drug under Hawaii Revised Statutes §329-5 as amended violates the constitutional guarantees of due process and equal protection of the laws under the Fourteenth Amendment.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment 14, in pertinent part:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process

of law; nor deny to any person within its jurisdiction the equal protection of the law.

Hawaii Revised Statutes §329-1 provides:

'Narcotic drugs' mean any of the following:

(1) Opium, isonipecaine, coca leaves, and opiate

(2) Any compound, manufacture, salt, derivatives, or preparation of opium, isonipecaine, coca leaves, or opiate;

(3) Any substance (and any compound, manufacture, salt, derivative, or preparation thereof) which is chemically identical with any of the substances referred to in clauses (1) and (2), including apomorphine or any of its salts;

(4) Opiates. The word "opiate" as used in clauses (1) and (2) shall mean any drug having addiction-forming or addiction-sustaining liability similar to morphine or cocaine;

(5) Marihuana. Marihuana includes the following substances under whatever names they may designate: all parts of the plant cannabis sativa, L., whether growing or not, the seeds thereof, the resin extracted from any part of the plant, and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or resin, but, shall not include the sterilized seed of the plant which is incapable of germination.

Hawaii Revised Statutes §329-5, as amended by Act 161, S.L.H. 1969 provides:

Additional acts prohibited; penalty. No person shall knowingly . . . possess . . . any narcotic durg

as defined by section 329-1 except as provided in this chapter. . . .

STATEMENT OF THE CASE

Petitioner Paul Lorin Kantner was charged by the State of Hawaii with the crime of Unlawful Possession of a Narcotic Drug in violation of Section 329-5 of the Hawaii Revised Statutes, to wit: Possession and control of Marijuana. (R. 2-3)[1]

Thereafter he filed a Motion to Dismiss on the grounds of the unconstitutionality of Section 329-5 H.R.S. as applied to marijuana. (R. 5-21)

In a parallel case petitioners Nowell and Winter had their probation revoked and were sentenced to the State Prison for Unlawful Possession of a Narcotic Drug, under Section 329-5, Hawaii Revised Statutes, to wit: Possession of Marijuana. (H.C. 91, R. 2, 6, 9-13)

Petitioners' counsel herein filed an application for a Writ of Habeas Corpus in the Nowell and Winter case and an Order to Show Cause (R. 2, 6, 9-13) (H. C. 91, R. 1-4) (R. 5-23) challenging the constitutionality of the statute which served as the basis of the revocation of their parole.

Petitioner Kantner's Motion to Dismiss and the companion Habeas Corpus applications of the remaining two petitioners were consolidated. (H.C. 91, Tr. 2-3).

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[1]The symbol "R" refers to the record on appeal to the Supreme Court of the State of Hawaii.

Thereafter an evidentiary hearing was conducted by the Circuit Court of the First Circuit of the State of Hawaii. During this hearing petitioners adduced an abundance of expert testimony that marijuana is not and could not under any definition be considered a narcotic drug. The testimony clearly and unequivocally demonstrated that scientifically, medically, or in fact no basis existed for equating marijuana and narcotic drugs since they were wholly anomalous and dissimilar in terms of characteristics, properties, and effects. (H.C. Tr. 38, 62-63, 68, 70, 140-141).

Following the hearing the Circuit Court denied petitioners Nowell and Winter's applications for Writs of Habeas Corpus (H.C. 91, R. 117-118).

Thereafter petitioner Kantner's trial was held in the Circuit Court. The Court overruled his previous motion to dismiss and found him guilty of the crime of unlawful possession of marijuana and sentenced him to pay a fine of $150. (R. 59)

Thereafter, the petitioners jointly appealed to the Supreme Court of Hawaii, the ultimate Court of the State. Petitioners challenged the federal constitutionality of the subject statute as it applied to marijuana.

On January 20, 1972, the Supreme Court of Hawaii, in a 3-2 decision with a separate concurring opinion, affirmed petitioner Kantner's conviction for possession of marijuana and the denial of petitioner Winter's and Nowell's application for Writ of Habeas Corpus, 493 P.2d 306, Appendix A. Only two judges of five sustained the validity of §329-5 without equivocation

against petitioners' contentions that the statute as applied to marijuana was constitutionally infirm under the Fourteenth Amendment.

Justice Levinson, dissenting, stated that the prohibition of private personal use of marijuana infringes upon the right of personal autonomy and that the evidence of social harm was insufficient to justify the making the mere private possession of marijuana a crime. Justice Kobayashi, in a separate dissenting opinion, reasoned that the classification of marijuana as a narcotic was unreasonable and unconstitutional in violation of the Fourteenth Amendment's due process and equal protection clause.

In their petition for rehearing, petitioners requested the Supreme Court of Hawaii to reconsider its opinion in the recent light of the landmark Illinois Supreme Court decision in *People v. McCabe*. It was pointed out that the Illinois Court had reached the opposite result from the Hawaii Supreme Court, in ruling that the legislative classification of marijuana as a narcotic constituted a denial of equal protection of the law.

On April 10, 1972, petitioners filed a timely amended petition for reconsideration and motion to stay issuance of the mandate. The Supreme Court of Hawaii denied the petition without opinion or comment despite the petitioners pointing out that this Court had recently refused to grant certiorari in *People v. Hudson*, 276 N.E.2d, 345, (cert. den. 31 L.Ed.2d 241) the case in which the *McCabe* decision was affirmed.

REASONS FOR GRANTING THE WRIT

I.

A STATE STATUTE WHICH REGULATES MARIJUANA BY CLASSIFYING IT AS AND INCLUDING IT WITH NARCOTIC DRUGS IS CONSTITUTIONALLY INVALID AS VIOLATIVE OF THE DUE PROCESS AND EQUAL PROTECTION GUARANTEES OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

A. The legislative means employed by the instant statute to regulate marijuana clearly run afoul of the constitutional mandate of reasonableness exacted by the Due Process Clause.

This Court has long recognized that although the police power of a State is very broad, it is not without limits. *Jacobson v. Massachusetts,* 197 U.S. 11, 49 L.Ed. 643, 11 S.Ct. 39.

The Due Process Clause of the Fourteenth Amendment prohibits a State from exercising its police powers in an unreasonable or arbitrary manner. *Nashville v. Walters,* 294 U.S. 405, 79 L.Ed. 949, 55 S.Ct. 486. *Sweet v. Rechel,* 159 U.S. 380, 40 L.Ed. 188, 16 S.Ct. 43, *Swickery v. Koota,* 389 U.S. 241, 19 L.Ed. 2d 444, 88 S.Ct. 391. Thus, to comport with the constitutional mandate of reasonableness, a statute enacted pursuant to the police powers, must seek to achieve a valid legislative object by *reasonable* means (emphasis added) rationally related to the legitimate end. *Goldblatt v. Hempstead,* 369 U.S. 590, 8 L.Ed.2d 130, 82 S.Ct. 987, *Buchanan v. Warley,* 245 U.S. 60, 60 L.Ed. 149, 38 S.Ct. 16, *Clason v. Indiana,* 306 U.S. 439, 83 L.Ed. 858, 59 S.Ct. 609.

The statute in question seeks to regulate marijuana by means of falsely classifying it as a narcotic and

irrationally and arbitrarily including it within the general category of criminally proscribed narcotics. In the light of present scientific evidence and contemporary enlightenment, it is submitted that the means so employed to effectuate the purpose of the statute are far from being reasonable or rational in nature. Marijuana is not realistically considered a narcotic drug.[2] The complete lack of any rationale basis for treating it in the same category as narcotics amply demonstrates that the method of regulation utilized is neither reasonable nor reasonably calculated to achieve the desired legislative end.

Further, in testing the validity of a state regulatory statute, the means used to regulate must, at a minimum, be reasonably necessary for the accomplishment of the legitimate regulatory purpose. *Lawton v. Steele,* 152 U.S. 133, 38 L.Ed. 385.

Additionally, the instant statute proscribes simple possession, sale, or use of any amount of marijuana. It follows that the purported power to regulate marijuana, a natural substance, under the police power is not necessarily coextensive with the power to entirely prohibit its possession and use. As Mr. Justice Douglas wrote in the Court's opinion *in Griswold v. Connecticut,* 381 U.S. 479, 485, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965):

> Such a law cannot stand in light of the familiar principle, so often applied by this Court,

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[2]See D. Pet, M.D., and J. Ball, Ph.D., "Marihuana Smoking in the United States." 32 Federal Probation 8 (No. 3, 1968), published by the Administrative Office of the United States Courts in Cooperation with the Bureau of Prisons of the Department of Justice, Washington, D.C.

> that a 'governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.'

The subject method adopted to regulate marijuana is both drastic and unduly oppressive. It clearly transcends the boundaries of that which is reasonable or necessary to achieve the end for which the law was adopted.

Therefore, it is respectfully submitted that the manner of regulation, being essentially arbitrary and overly broad, must be regarded as an unconstitutional abuse of the state's police-power. *House v. Mayes,* 219 U.S. 270, 55 L.Ed. 213, 31 S.Ct. 234, *Nebbia v. New York,* 291 U.S. 502, 78 L.Ed. 940, 54 S.Ct. 505. Clearly "the legislature is burning the house to roast the pig." *Butler v. Michigan,* 352 U.S. 380 at 383, 1 L.Ed.2d 412, 77 S.Ct. 524.

B. The legislative definition of marijuana as a narcotic drug and its inclusion in Section 329-5 within the Narcotic Statute constitutes an unreasonable, irrational, arbitrary and impermissible statutory classification in violation of the Equal Protection Clause of the Fourteenth Amendment.

The Equal Protection Clause of the Fourteenth Amendment affords protection against arbitrary, unreasonable and irrational legislative classification. *Morey v. Doud,* 354 U.S. 457, 1 L.Ed.2d 1485, 77 S.Ct. 1344. *Gulf, C. and S.F.R. Co. v. Ellis,* 165 U.S. 150, 41 L.Ed. 666, 17 S.Ct. 255.

This Court has long held that a classification which does not rest upon a reasonable basis and which is essentially arbitrary in nature denies equal protection of the law. *Lindsley v. Natural Carbonic Gas Co.,* 220 U.S. 61, 55 L.Ed. 369, 31 S.Ct. 337.

The available evidence conclusively demonstrates that marijuana is not in fact a narcotic drug.[3] *People v. McCabe,* 275 N.E.2d 407, 411 (1971); *State v. Zarnes,* 475 P.2d 109, 115 (1970). Legislatively defining marijuana as a narcotic in the category of heroin and other opiates is as unreasonable and irrationally unsound as denoting alcohol and tobacco to be narcotic drugs.[4] It follows, therefore, that the legislative designation of marijuana as a narcotic amounts to an unreasonable and arbitrary and, hence, constitutionally improper classification.

Under Section 329-5 of the Narcotic Statute, marijuana is improperly included and categorized with opium, heroin and similar "hard drugs" for purposes of regulation and punishment. Today, based on expanded knowledge, the overwhelming consensus of the knowledgeable medical and scientific community is that marijuana is in all respects fundamentally dif-

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[3]MARIJUANA—*A Signal of Misunderstanding*—First Report of the National Commission of Marijuana and Drug Abuse (1972) at p. 177; Legislative History of the Comprehensive Drug Abuse Prevention and Control Act of 1970 P.L. 91-513 (3 U.S. Cong. and Adm. News '70 4577).

[4]It cannot be doubted that this Court may rely on the current writing of authorities in a rapidly developing field in determining the true state of facts upon which a law is based. *Brown v. Board of Education,* 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954).

ferent from narcotic drugs.[5] Marijuana is so obviously unlike the narcotic drugs in terms of characteristics, properties, reactions, physiological and psychological effects on the individual and society that the legislative judgment combining and equating it with narcotics and punishing possession as a narcotic offense is wholly devoid of any rational basis.

Thus, it is clear that Section 329-5 creates an irrational and capricious legislative classification. "The equal protection clause would indeed be a formula of empty words if such conspicuously artificial lines could be drawn." *Skinner v. Oklahoma, ex rel. Williamson,* 316 U.S. 535, 542, 86 L.Ed. 1655, 1660, 62 S.Ct. 1110.

The present legislative classification of marijuana, in addition to being unreasonable and irrational, is further constitutionally indefensible when tested under

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[5]See Justice Swainson's opinion in *People v. Sinclair,* 40 U.S. Law Week, 2646 (1972);

Secretary of Health, Education and Welfare, SECOND ANNUAL REPORT TO CONGRESS entitled *Marijuana and Health;*

Szara, Stephen D., *The Effects in Man, in Marijuana and Health,* HEW report, *supra;*

Forney and Kiplinger, *Toxicology and Pharmacology of Marijuana;*

The President's Commission on Law Enforcement and Administration of Justice. *Task Force Report: Narcotics and Drug Abuse;*

See L. Grinspoon, M.D., *Marijuana Reconsidered* (Bantam Ed. 1971), pp. 39-46, 60;

J. Kaplan, *Marijuana and the New Prohibition* (World Publishing Co., 1970).

F. Yolles, M.D., Director of the National Institute of Mental Health, testifying before the Sub-Committee on Public Health and Welfare of the Interstate and Foreign Commerce Committee on September 17, 1969, stated:

> In the past, dangerous drugs were grouped arbitrarily, sometimes by historical accident rather than with regard for their differing characteristics and their specific and distinct effects.

the onus of prevailing stringent standards. The Fourteenth Amendment requires a higher standard be met in testing the validity of a classification when a fundamental constitutional right is affected. *McLaughlin v. Florida,* 379 U.S. 184, (1964).[6]

As stated by Mr. Justice Goldberg in *Griswold, supra,* at p. 496:

> Elsewhere I have stated that 'while I quite agree with Mr. Justice Brandeis that . . . " a . . . State may . . . serve as a laboratory; and try new social and economic experiments" *New State Ice Co. v. Liebmann,* 285 U.S. 262, 280, 311 (dissenting opinion), I do not believe that this includes the power to experiment with the fundamental liberties of citizens. . .'

This Court has held that a statutory classification which penalizes the exercise of a fundamental constitutional right is constitutionally invalid "unless it is necessary to promote a *compelling* (emphasis added) governmental interest." *Shapiro v. Thompson,* 394 U.S. 618, 634; 22 L.Ed.2d 600, 89 S.Ct. 1322 (1969).

Although not explicitly mentioned in the Federal Constitution, this Court has recognized that the right to be free from unwarranted governmental intrusions into one's privacy, or more aptly stated, the personal right to be left alone is a fundamental right secured under the Constitution. *Griswold, supra.*

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[6]See Boyko and Rotberg, *Constitutional Objections to California's Marihuana Possession Statute,* 14 U.C.L.A. L. Rev. 773 (1967).

The classification of marijuana as a narcotic within the subject narcotic statute involves an issue of "fundamental liberty". The statute proscribing the possession and private use of a natural substance penalizes the exercise of the basic right of privacy. It follows that under the test established in the *Shapiro* decision, *supra,* the state bears a heavy burden to warrant the intrusion of petitioner's fundamental rights.

Petitioners contend that the state must demonstrate a compelling governmental interest to justify the making of mere possession of marijuana a narcotic offense. At a minimum the state must be required to show that mere possession of marijuana or possession for personal use (in the home) are inimical to such interests; the harm must affect the general public; and thereby the general welfare. For example, although obscenity is not constitutionally protected by the First Amendment, the state may not constitutionally punish the mere private possession of obscene materials. *Stanley v. Georgia,* 394 U.S. 575, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969).

It is petitioners' contention that the subject classification promotes no compelling governmental interest; nor is it necessary to effectuate any permissible state policy. In view of the foregoing, the classification in issue is constitutionally invalid under the Fourteenth Amendment as depriving petitioners equal protection of the law.

At least two states have recognized that their own regulatory statutes which improvidently classify and

proscribe marijuana as a narcotic are constitutionally defective under the Fourteenth Amendment of the United States Constitution. See *People v. McCabe, op. cit.* (1971; Illinois); *People v. Sinclair,* 40 U.S. Law Week 2646 (1972; Michigan).

Without a clear dispositive pronouncement by this Court, Hawaii and other states have recently upheld the clearly erroneous and improper legislative classification and proscription of marijuana as a narcotic drug against attack on federal constitutional grounds. See *Commonwealth (of Massachusetts) v. Leis,* 243 N.E.2d 898; *Archer v. State of Texas,* 472 S.W.2d 484; *State v. White,* 456 P.2d 54 (Mont.); *Borras v. State (Fla.),* 229 So.2d 244; *Raines v. State (Fla.),* 225 So.2d 330; *People v. Stark,* 400 P.2d 923; *Spence v. Sacks,* 183 N.E.2d 363 (Ohio). This Court, as the ultimate arbiter of the issues involved in this case, can effect integrity, reasonableness, and rationality in the law regulating marijuana by eliminating its false and constitutionally invalid classification as a narcotic drug.

Accordingly, this Court should grant Certiorari in order affirmatively to respond to the substantial and highly pertinent federal questions raised by this petition. The case at bar is not only monumental by virtue of its being a case of novel impression for this Court, but additionally its significance is heightened far beyond measure when its future ramifications are considered.

CONCLUSION

In view of the considerations set forth above, we respectfully submit that the petition for a Writ of Certiorari is meritorious and should be granted.

Respectfully submitted,

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May, 1972.

(Appendices Follow)

Appendix A

OPINION OF THE SUPREME COURT OF HAWAII

In The Supreme Court of Hawaii

October Term, 1971

State of Hawaii, Plaintiff-Appellee v.
Paul Lorin Kantner, Defendant-Appellant

No. 4995

and

In re Application of David Allen Nowell and Claude Ernest Winter, Petitioners-Appellants, for Writ of Habeas Corpus, etc.

No. 5005

Appeal From The First Circuit Court
Honorable Allen R. Hawkins, Judge

January 20, 1972

RICHARDSON, C.J., MARUMOTO, ABE, LEVINSON and KOBAYASHI, JJ.

Statutes—construction and operation—general rules of construction—interpretation clauses and definitions in statutes construed.

The legislature has a broad power to define terms for a particular legislative purpose and the courts, as a general rule, are bound to follow the legislative definitions of terms rather than

commonly accepted dictionary, judicial or scientific definitions.

Constitutional Law—criminal prosecutions—statutory creation or definition of offense.

Although marihuana is not a narcotic, scientifically defined, inasmuch as the word "narcotic" in popular usage includes marihuana, the inclusion of the drug marihuana within the legislative definition of the term narcotic is not unreasonable and arbitrary so as to violate the constitutional guarantee of due process of law.

Same—construction, operation and enforcement of constitutional provisions—persons entitled to raise constitutional questions.

An accused has standing to challenge only the offenses with which he has been charged.

Same—same—determination of constitutional questions—presumptions and construction in favor of constitutionality.

A statute is presumed to be constitutional.

Same—same—same—same.

The party attacking the statute must show with convincing clarity that the statute is unconstitutional.

Same—same—same—same.

Assuming that it can be shown that the legislature has enacted legislation on the basis of fear induced hysteria, such proof does not relieve the

party attacking the statute of the burden of clearly showing that no rational factual basis exists to support the statute.

Same—equal protection of laws—exercise of police power in general.

Dissimilarity between the drugs marihuana and alcohol form a basis for dissimilar legislative treatment of the two drugs.

OPINION OF RICHARDSON, C.J., in which MARUMOTO, J., joins, announcing the judgment of the court.

The sole issue presented in this consolidated appeal is the constitutionality of the statutory scheme for the control of the possession of marihuana. HRS §329-5, as amended by Act 161, S.L.H. 1969, which served as the basis of parole revocation of petitioners Nowell and Winter and upon which defendant Kantner was convicted, provides as follows:

Additional acts prohibited; penalty. No person shall knowingly . . . possess . . . any narcotic drug as defined by section 329-1 except as provided in this chapter. . . .

Under HRS §329-1 the term "narcotic drug" is defined as follows:

'Narcotic drugs' mean any of the following . . .

(5) Marihuana. Marihuana includes the following substances under whatever names they may designate: all parts of the plant cannabis sativa, L., whether growing or not, the seeds thereof, the resin extracted from any part of the plant, and every compound, manufacture, salt, derivative,

> mixture, or preparation of the plant, its seeds, or resin, but, shall not include the sterilized seed of the plant which is incapable of germination.

Appellants concede that the State may properly regulate the possession of marihuana under the police power. The thrust of appellants' argument is that the State has so unreasonably and irrationally exercised its police power that the present statutory scheme for the prohibition of possession of marihuana violates the constitutional guarantees of equal protection and due process of law. Uncontroverted evidence showed that in some respects marihuana was unlike the opiates and other drugs within the scientific definition of the word "narcotic". The evidence, however, tended to show that marihuana has many of the properties of a narcotic, scientifically defined.[1]

Proceeding from the proposition that marihuana is not a narcotic scientifically defined, appellants contend that the defining of the term narcotic so as to include marihuana and the inclusion of marihuana within the same class as the more harmful narcotic drugs is so unreasonable and arbitrary as to violate

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[1]The evidence tended to show that narcotic drugs have the property of relieving pain in small doses, produce stupor and invoke sleep in higher doses and eventually cause death by respiratory paralysis. Except for the ability to cause death through respiratory paralysis, these properties of narcotic drugs are properties shared with marihuana. The phenomenon of "tolerance," whereby the user is required to take, over a period of time, increasingly larger doses in order to achieve the same initial effect and the phenomenon of "physiological dependence," whereby the symptoms of salivation, nausea, convulsions and extreme pain accompany the withdrawal of the drug to the user, were shown to be properties of narcotics, scientifically defined, but not properties of marihuana.

the constitutional guarantees of equal protection and due process of law.

The legislature has a broad power to define terms for a particular legislative purpose, and the courts, as a general rule of construction, are bound to follow legislative definitions of terms rather than commonly accepted dictionary, judicial or scientific definitions. *Bailey's Bakery, Ltd. v. Borthwick,* 38 Haw. 16 (1948); *Akai v. Lewis,* 37 Haw. 374 (1946); *Hawaii Consolidated Ry. v. Borthwick,* 34 Haw. 269 (1937). We think the requirements of due process place some limitation on the manner in which a legislature may use words. If we believed that the use of the word narcotic to include marihuana were so misleading as to confuse legislators in their law-making activities[2] or to confuse persons of common understanding in their effort to determine whether the possession of marihuana constitutes a crime, it would clearly be our duty to declare the unconstitutionality of the statute. Inasmuch as the word "narcotic" in popular usage

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[2]The proposition that legislation be enacted in a form not misleading to the legislators is contained in Article III, section 15 of the Hawaii Constitution, which provides in part: "Each law shall embrace but one subject, which shall be expressed in the title." In re Goddard, 35 Haw. 203, 207 (1939), decided under the Organic Act, indicated that the purpose of the "one subject expressed in the title rule" was:

> . . . [F]irst, to prevent hodgepodge or 'logrolling' legislation; *second,* to prevent surprise or fraud upon the legislature by means of provisions in the bills of which the titles gave no intimation, and which might therefore be overlooked and carelessly and unintentionally adopted; and *third,* to fairly apprise the people, through such publication of legislative proceedings as is usually made, of the subjects of legislation that are being considered, in order that they may have the opportunity of being heard thereon, by petition or otherwise, if they shall so desire.

includes marihuana, it is no violation of the guarantee of due process of law for the legislature to employ such usage over the more precise usage favored by the scientific community. *Cf., Territory v. Tam,* 36 Haw. 32, 37 (1942).

We think that appellants' contentions concerning the legislative classification of marihuana are untenable. Appellants contend that the legislature has placed the offenses of possession of marihuana and the possession of narcotics, scientifically defined, within the same legislative classification. We disagree; the legislature has provided for markedly different penalties for possession of marihuana as opposed to narcotics, scientifically defined.[3] Certain offenses involving marihuana are treated the same as the corresponding offense involving a narcotic scientifically defined, for example, the cultivation, production or manufacture of the drug. These offenses, however, are not before us and under the doctrine of *State v. Grahovac,* 52 Haw. 527, 480 P.2d 148 (1971), we decline to consider these related offenses. Were we to consider the supposed constitutional problem involving the inclusion of marihuana offenses within the same classification as offenses involving narcotics scientifically defined, we would find the following language

[3]HRS § 329-5, as amended, Act 161, S.L.H. 1969, provides that for the first and subsequent offenses, one who is found guilty of possession of marihuana is subject to imprisonment "for not more than one year, or for not less than one year nor more than five years." Persons found guilty of the possession of drugs defined as narcotic drugs in HRS § 329-1, other than marihuana, are subject to imprisonment of "not more than five years for the first offense" and "not more than ten years for any subsequent offense."

of the Massachusetts Supreme Judicial Court most persuasive:

> . . . All of these substances [marihuana and the narcotics scientifically defined] are "mind-altering" drugs. The fact that some are more potent or more dangerous than others does not render the classification arbitrary. To some degree they are all capable of producing psychotic disorders, states of intoxication and psychological dependency, and consequently present some danger to the health and safety of the community. We do not think that classification of marihuana with the others is arbitrary or irrational. *Commonwealth v. Leis,* 355 Mass. 189, 197, 243 N.E.2d 898, 905 (1969).

Appellants' main contention concerning classification is the argument that the properties of the drugs alcohol and marihuana are so similar that a provision for a penalty for the possession of marihuana in a case where there is none made for possession of alcohol violates the constitutional guarantee of the equal protection of the laws. The issue then is not whether marihuana is more like alcohol than heroin but whether there are sufficient dissimilarities between alcohol and marihuana to support different legislative treatments. We think alcohol and marihuana are sufficiently dissimilar to justify dissimilar legislative treatment. Alcohol is a drug about which much is known concerning the long-term effect on the human body; of marihuana, much less is known. On that basis alone, treatment dissimilar to that given alcohol is justified, at least until scientific research conclusively establishes the long-term effects of the drug mari-

huana. Since it is presumed that statutes are constitutional, *Bishop Trust Co. v. Burns,* 46 Haw. 375, 381 P.2d 687 (1963); *McKenzie v. Wilson,* 31 Haw. 216 (1930); *Territory v. Armstrong,* 28 Haw. 88 (1924) and since the party attacking the statute must show with convincing clarity that the statute is unconstitutional, *Hasegawa v. Maui Pineapple Co.,* 52 Haw. 327, 475 P.2d 679 (1970); *Koike v. Board of Water Supply,* 44 Haw. 100, 352 P.2d 835 (1960), the absence of sound scientific data concerning the long-term effects of marihuana renders appellants' burden insurmountable.

Appellants argue that Hawaii's original narcotics legislation was enacted in 1931, during a period of American history in which public attitude toward marihuana was largely colored by false and unsubstantiated claims concerning the dangers of marihuana. Accordingly, appellants argue, the statute must fall in light of present knowledge concerning marihuana. While we concede that evidence tends to show a less than enlightened public understanding concerning the nature of the dangers of marihuana during the period in question, we cannot accept appellants' contention. There has been no showing that a general nation-wide hysteria over the marihuana question did in fact induce the 1931 Territorial Legislature to act.[4] Assuming such a connection could be

[4]The original enactment of a narcotic law was Act 152, S.L.H. 1931, predating the height of the alleged general nation-wide marihuana hysteria by several years. Until Act 228, S.L.H. 1959, marihuana was treated separately from the narcotics, scientifically defined, and was not included in the legislative definition of narcotic drugs.

established, it would mean very little.[5] Assuming arguendo that the legislature did act on the basis of fear-induced hysteria, the party attacking a statute would not be relieved from the burden of clearly showing that no rational factual basis exists to support the statute.

With respect to appellants' argument that the use of marihuana involves an issue of "fundamental liberty" and, hence, a different standard of review should be applied to the statute, we do not think that appellants have established that the interest of the individual in possessing and using marihuana is within the class of interests to which the state and federal constitutions accord the highest degree of protection. We recognize that there is limited authority for the proposition that the use of peyote, another mind-altering drug, may be protected in limited circumstances as a valid exercise of native American Indian religion. *People v. Woody,* 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964); *contra, State v. Big Sheep,* 75 Mont. 219, 243 P. 1067 (1926); *Oliver v. Udall,* 306 F.2d 819, *cert. denied,* 372 U.S. 908 (1962). We doubt, however, that use of a mind-altering drug, absent an intimate connection with a "preferred freedom", requires the standard of review which appellants suggest. Our reading of *Griswold v. Connecticut,* 381 U.S. 479 (1965) leads us to conclude, as did the court in *People v. Aguiar,* 257 Cal.

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[5] "We know of nothing that *compels* the Legislature to thoroughly investigate the available scientific and medical evidence when enacting a law." Commonwealth v. Leis, *supra,* 355 Mass. 189, 192, 243 N.E.2d 898, 901-2 (1969).

App.2d 597, 65 Cal. Rptr. 171, *cert. denied,* 393 U.S. 970 (1968) that there is no fundamental guarantee protecting the use and possession of euphoric drugs. We decline, as did the Supreme Court in *Griswold, supra,* 381 U.S. at 481-82 to accept the invitation of *Lochner v. New York,* 198 U.S. 45 (1905) to "sit as a super-legislature to determine the wisdom, need and propriety of laws that touch economic problems, business affairs, or social conditions." As we read *Griswold, supra,* the test of whether an activity may be considered to rest under the "penumbra" of a preferred freedom is that the activity in question must be essential, not merely desirable, for the exercise of the specifically enumerated rights.[6]

Affirmed.

Hyman M. Greenstein for appellants.

Michael Weight, Deputy Prosecuting Attorney (Barry Chung, Prosecuting Attorney, with him on the brief) and

Thomas M. Pico, Jr., Deputy Attorney General (Bertram T. Kanbara, Attorney General, and Morton

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[6]We are led to this reading of the test laid down in Griswold, *supra,* by the Court's characterization of its methodology at 381 U.S. at 481-83. There the Court suggests that the result in Griswold, *supra,* is simply a logical extension of Pierce v. Society of Sisters, 268 U.S. 510 (1925) and Meyer v. Nebraska, 262 U.S. 390 (1923). The Court uses Pierce, *supra,* and Meyer, *supra,* and related cases to show a pattern of penumbral First Amendment freedom of speech analysis. According to the Court's Griswold opinion, 381 U.S. at 482, the following pattern is discernible:

> By *Pierce v. Society of Sisters, supra,* the right to educate one's children as one chooses is made applicable to the States by the force of the First and Fourteenth Amendments. By *Meyer v. Nebraska, supra,* the same dignity is given the right to study the German language in a private school. In other

King, Senior Deputy Attorney General, with him on the brief) for appellees.

CONCURRING OPINION OF ABE, J.

It is conceded by the appellants that the regulation of the use of marijuana is a reasonable and legitimate exercise of the police power of this State. However, they contend that the inclusion of marijuana in the narcotic drug statute, HRS Ch. 329, is unreasonable and violates the Due Process Clauses of the United States Constitution and the Hawaii State Constitution. The appellants presented this question as the sole issue on appeal.

I.

Appellants contend that marijuana does not have the common attributes present in narcotics and does not come within the scientific definition of "narcotics,"

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words, the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read (*Martin v. Struthers*, 319 U.S. 141, 143) and freedom of inquiry, freedom of thought, and freedom to teach (*see Wieman v. Updegraff*, 344 U.S. 183, 195)—indeed the freedom of the entire university community. *Sweezy v. New Hampshire*, 354 U.S. 234, 249-50, 261-63; *Barenblatt v. United States*, 360 U.S. 109, 112; *Baggett v. Bullitt*, 377 U.S. 360, 369.

The reason that the above cited activities must fall under the protection of the First Amendment is that "[w]ithout those peripheral rights the specific rights would be less secure." 381 U.S. at 482-83. In light of the Court's warning to eschew the substantive due process approach of Lochner v. New York, *supra*, we think the test of a penumbral constitutional right must be restricted to that which is essential to the continued viability of the specifically enumerated rights. Otherwise the test becomes one not of law, but of the personal whim and predilection of the judge.

and that, therefore, the classification of marijuana with narcotics is irrational and unreasonable and violates the due process guaranty. On the other hand the State contends that once the statute defines marijuana among narcotic drugs, it is immaterial that the statutory definition is not identical to the scientific definition.

The two expert witnesses who testified defined marijuana to be a drug and I have no doubt that marijuana may be classified as a drug.

Judging from articles written by experts on the subject of marijuana it appears that it has certain characteristics of narcotics. Dr. Casarett, who was called by the appellants as well as the appellee, testified that cocaine, opium, morphine, and marijuana all can be classified as euphotic, and as stimulants and intoxicants. He also testified that "a narcotic compound is, in its strictest definition, * * * one which stupefies, depresses the central nervous system, tends to produce sleep, these are often taken as synonymous entities." In his testimony he stated, contrary to the appellants' contention, that the definition of a narcotic did not include the capacity to produce a tolerance or physical addiction. However, he also stated that in his opinion tolerance can be developed to marijuana and that this opinion is supported by the current pharmacological and medical writers. This tolerance, he stated, is more properly defined as a "drug dependence," and is basically a psychic dependence. He then concluded that the physiology of the dependence is more or less irrelevant, and that marijuana is an addicting drug in an over-all sense.

However, whether or not marijuana is technically a "narcotic" is irrelevant. I agree with Chief Justice Richardson's statement that:

> "The legislature has a broad power to define terms for a particular legislative purpose, and the courts, as a general rule of construction, are bound to follow legislative definitions of terms rather than commonly accepted dictionary, judicial or scientific definitions. * * * Inasmuch as the word 'narcotic' in popular usage includes marijuana, it is no violation of the guarantee of due process of law for the legislature to employ such usage over the more precise usage favored by the scientific community. * * *"

I believe that the more interesting and pertinent issue raised by the Due Process and Equal Protection Clauses is not whether marijuana is a "narcotic," but whether marijuana is, like narcotics, sufficiently harmful to the general welfare that the possession of marijuana may be prohibited in the same way possession of the narcotics is prohibited. However, the only argument made by the appellants is that marijuana is not technically a "narcotic," and cannot be included in a statutory scheme with true narcotics. Thus, it is unnecessary to reach other issues raised by the Equal Protection Clause and the Due Process Clause. However, inasmuch as other justices today have reached some of those issues, I will briefly outline my thoughts.

II.

I do not agree with Chief Justice Richardson that one does not enjoy the fundamental constitutional right to smoke marijuana. I stated in the dissent in

State v. Lee, 51 Haw. 516, 465 P.2d 573 (1970), that I believed that under Art. I, Sec. 2 of the Hawaii State Constitution[1] one has a fundamental right of liberty to make a fool of himself as long as his act does not endanger others, and that the state may regulate the conduct of a person under pain of criminal punishment only when his actions affect the general welfare—that is, where others are harmed or likely to be harmed. Thus, I believe that the right to the "enjoyment of life, liberty and the pursuit of happiness" includes smoking of marijuana, and one's right to smoke marijuana may not be prohibited or curtailed unless such smoking affects the general welfare.

I have read numerous articles on marijuana and I believe that I gained some knowledge on the subject, however, I consider myself far from being an expert. Truthfully, I cannot say whether those who claim that the use of marijuana is harmful are correct or those who take the opposite view are correct.

It would appear that Professor John Kaplan has adopted an objective view when he says:

> "[T]oday, the allegations are not that long-term marijuana use causes mental illness but rather that it causes another type of mental deterioration—brain damage. Primary reliance again is

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[1]Art. I, Sec. 2 of the Hawaii State Constitution reads:

"All persons are free by nature and are equal in their inherent and inalienable rights. Among these rights are the enjoyment of life, liberty and the pursuit of happiness, and the acquiring and possessing of property. These rights cannot endure unless the people recognize their corresponding obligations and responsibilities."

placed upon foreign studies, but these suffer from great methodological difficulties and, in fact, seem to agree that moderate use of the drug is not harmful. The most reliable foreign study, that of the Indian Hemp Drugs Commission, as well as recent studies in the United States, indicate the long-range effects of most marijuana use are not serious. The effects of long-term heavy use of marijuana are in great part not known. A major reason for this is that the methodological difficulties in the studies that purport to find serious damage are so significant that one simply cannot tell. In addition, the problem of determining the long-range mental harm due to any substance is an extremely difficult one.

* * * * *

"On the other hand, medical groups that have denounced marijuana as a dangerous drug are not completely wrong. To some extent, of course, the drug *is* dangerous." Kaplan, *Marijuana, The New Prohibition,* pp. 193-94.

He then says, at pages 314-15:

"In the case of marijuana, just as in the case of alcohol or tobacco, no matter what means of control is attempted, there will be those who will use the drug to their own and to society's detriment. The dangers of marijuana may have been grossly exaggerated, but as shown in Chapter V, they are far from negligible—especially for the very young. And although the total number affected seriously may still not be very impressive compared to the magnitude of other public-health problems, there is no reason why we should not strive to keep it as low as practicable.

* * * * *

> "It would seem clear, therefore, that we should treat marijuana considerably more respectfully than we do sugar candy. * * *"

Judging from the multitude of writings, there is considerable controversy on the issue whether marijuana is or is not harmful. Also it was testified that using the analogy of an iceberg only 5% is known about marijuana and its effects and therefore can be considered above water, and 95% is unknown or under water. On the other hand, on the subject of alcohol and tobacco and their effects 90% is known or above water.

Of course, in my opinion, the finding that marijuana is harmful to the user does not authorize the State under its police power to prohibit its use under threat of punishment. Under the doctrine I stated in the dissent in *State v. Lee,* 51 Haw. 516, 465 P.2d 573 (1970), the State must prove that the use of marijuana is not only harmful to the user but also to the general public before it can prohibit its use. However, the appellants have conceded both in the trial court and on appeal that the State may regulate the use of marijuana under its police power. Thus, under the record of this case the State was not required to prove this point. It would be unreasonable for this Court therefore to hold that, in spite of this concession in the proceedings, the State should have met its burden of proof on this point.

Therefore, under the record of this case, I am compelled to affirm the judgment of the trial court.

DISSENTING OPINION OF LEVINSON, J.

I dissent.

The crucial issue in this case is whether a person has a constitutionally protected right purposely to induce in himself, in private, a mild hallucinatory mental condition through the use of marihuana. I believe that there is such a right and that it is founded upon the constitutional rights to personal autonomy and privacy, guaranteed by article I, sections 2 and 5 of the Hawaii Constitution as well as by the due process clause of the fourteenth amendment of the Federal Constitution. I believe that HRS § 329-5 (Supp. 1971) violates both constitutions because it unreasonably infringes upon these rights and, therefore, I would reverse.

I. The Right to Be Let Alone and Its Relation to the Private, Personal Use of Marihuana.

In our system of law the personal autonomy and privacy of individuals is afforded the highest consideration. The very concept of limited government evinces a desire to free persons from the unbounded control of the State, in order that they may most productively pursue their own life goals. Perhaps the best articulation of the values inherent in American constitutional law was given by Mr. Justice Brandeis in his now famous dissenting opinion in *Olmstead v. United States,* 277 U.S. 438, 478 (1928), quoted with approval in *Stanley v. Georgia,* 394 U.S. 557, 564 (1969):

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure, and satisfactions of life are to be found in material things. They sought to protect Americans in their *beliefs,* their *thoughts,* their *emotions* and their *sensations.* They conferred, as against the Government, *the right to be let alone* —the most comprehensive of rights and the right most valued by civilized men. (emphasis added)

This right to personal autonomy lies at the heart of our system of government. Some of its component ideas find expression in the constitutional guarantees of free speech, press, assembly, religion[1] and freedom from unreasonable searches and seizures.[2] These guarantees uphold the dignity of the individual and protect his right to develop in accordance with the inward forces which make him a unique human being. As important as these enumerated rights are, however, it would be grave error to hold that they exhaust the limits on the power of government to invade the individual's right to freedom of thought and action. The framers of the United States Constitution recognized that individual freedom is not susceptible to full definition by verbal enunciation and thus warned in the ninth amendment:

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[1]Article I, section 3 of the Hawaii Constitution and the first amendment of the United States Constitution.

[2]Article I, section 5 of the Hawaii Constitution and the fourth amendment of the United States Constitution.

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.[3]

Mr. Justice Goldberg in his concurring opinion in *Griswold v. Connecticut,* 381 U.S. 479, 494 (1965), expressed the belief that this amendment afforded proof that due process of law encompasses a fundamental personal right of privacy. *Accord State v. Abellano,* 50 Haw. 384, 386, 441 P.2d 333, 335 (1968) (concurring opinion of Levinson, J.). In Hawaii there can now be no doubt that the right of privacy exists as a basic safeguard of individual liberty since it has been given substantive expression in article I, section 5 of the State Constitution.[4]

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[3]Article I, section 20 of the Hawaii Constitution contains a similar rule of construction.

[4]Article I, section 5 provides:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches, seizures, and *invasions of privacy* shall not be violated; . . . (emphasis added).

The term "invasions of privacy" was added in the 1968 Constitutional Convention whose Standing Committee Report No. 55 in explaining it and urging its adoption said that it "will effectively protect the individual's wishes for privacy as a legitimate social interest. The proposed amendment is intended to include protection against indiscriminate wiretapping as well as undue government inquiry into and regulation of those areas of a person's life which is defined as necessary to insure 'man's individuality and human dignity.'" The debates in the Convention's Committee of the Whole on September 10, 1968, relating to the amendment include the following explanation by Delegate Larson:

> Mr. Chairman, the right of privacy has been defined in many ways. Mr. Justice Clark called it the right to be let alone, to live one's life as one chooses, free from assault, intrusion or invasion except as they can be justified by the clear needs of community living, under a government of law. Privacy has also been defined as a right to be let alone,

This constitutional right to privacy encompasses more than just freedom from government surveillance. It guarantees to the individual the full measure of control over his own personality consistent with the security of himself and others. This freedom to choose one's own plan of life is essential to the pursuit of happiness and the enjoyment of life and thus finds additional protection in article I, section 2 of the Hawaii Constitution.[5] *See State v. Shigematsu,* 52

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the right of personality, or man's individuality and human dignity.

. . . I feel that each of us has his own definition of the so-termed "right of privacy" which is meaningful to himself. . . . Personally, there are several main reasons why I feel such an addition of the right of privacy to this section would be worthwhile for inclusion in our Constitution.

. . . .

Another area which has been under consideration in modern times is that of marital privacy. To what extent is government to be allowed into the intimacy of such a relationship, whether by regulating contraceptive devices or by specifying what can and what cannot be engaged in, in the intimacies of one's bedroom.

. . . I feel the inclusion of such a right of privacy would be reflective of our times. The idea of right is an evolving concept constantly changing with the times. To the delegates of the 1950 Convention, it was important that we would not disqualify a juror because of sex or discriminate against persons in military enlistment. As some guarantees . . . become obsolete or archaic, others become important. A Bill of Rights should not only mirror ages past but should also recognize up to date demands upon human rationality and society. . . .

. . . I feel that the right of privacy is indeed one mark of freedom or democracy in our times. One of the great differences between countries which are called totalitarian or dictatorial and those which are called democratic or swingy is that of respect for the individual, in appreciation of the individual's right insofar as possible to live his life without undue interference on the part of the state or of the government.

[5]Article I, section 2 provides:

All persons are free by nature and are equal in their inherent and inalienable rights. Among these rights are the enjoyment of life, liberty and the pursuit of happiness, and

Haw. 604, 610, 483 P.2d 997, 1000 (1971). In the instant case, the State's infringement upon this right of personal autonomy becomes apparent when one understands the nature of marihuana and the reasons for its use.

It is now universally recognized by modern authorities on the subject that marihuana is not a drug of addiction; that is, unlike narcotic drugs, marihuana does not produce physical dependence in the user which compels its continued use. L. GRINSPOON, M.D., MARIHUANA RECONSIDERED 233 (1971).[6] The individual who uses marihuana does so from choice, in the pursuit of various goals which may include the relief from tension, the heightening of perceptions, and the desire for personal and spiritual insights. L. GRINSPOON, M.D., *supra* at 176; J. KAPLAN, MARIJUANA—THE NEW PROHIBITION 73-74 (1970); M. Town, *"Privacy and the Marijuana Laws,"* reprinted in THE NEW SOCIAL DRUG 129-30 (1970); Watts, *Psychedelics and Religious Experience,* 56 Calif. L. Rev. 74, 76-79 (1968). In short, marihuana produces experiences affecting the thoughts, emotions and sensations of the user. These experiences being mental in nature are thus among the most personal and private experiences possible. For this reason I believe that the right to be let alone protects the individual in private conduct which is designed to affect these areas of his person-

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the acquiring and possessing of property. These rights cannot endure unless the people recognize their corresponding obligations and responsibilities.

[6]Dr. Lester Grinspoon is Associate Clinical Professor of Psychiatry at the Harvard Medical School and Director of Psychiatry (Research) at the Massachusetts Mental Health Center.

ality, so long as such conduct does not produce detrimental results.

This principle that the State's power to restrain private conduct is limited by the need to show social injury was recognized by this court in *State v. Lee*, 51 Haw. 516, 521, 465 P.2d 573, 577 (1970):

> [W]here an individual's conduct, or a class of individuals' conduct, does not directly harm others the public interest is not affected and is not properly the subject of the police power of the legislature.

In the *Lee* case, the court went on to announce a narrow exception to the above general rule. The State may also act to protect a large class of individuals from harm to themselves, but only where such harm has been compellingly demonstrated to the satisfaction of the court. *State v. Lee, supra.* Because the State has failed to establish that the private, personal use of marihuana harms either the user or society, I would hold that the prohibition of HRS § 329-5 (Supp. 1971) unreasonably infringes upon the appellants' rights to personal autonomy.

II. The Evidence of Social Harm Is Insufficient to Justify Making the Mere Private Possession of Marihuana a Crime.

The State puts forth two main arguments as justification for prohibiting personal possession of marihuana. Primary reliance is placed on the contentions that marihuana is psychologically and physically harmful to the user. These contentions, however, are

disputed by the State's own expert witnesses, who were called to testify in the trial below on the toxic nature of marihuana.

When asked on direct examination whether in the course of his practice he had personally observed any adverse effects from the use of marihuana, Dr. Fred Weaver, Chief Psychiatrist for the Adolescent Unit of the Hawaii State Hospital, Kaneohe, answered: "No, I haven't, that I could attribute to the use of marihuana." Dr. Weaver did testify that some large users exhibited the development of the so-called "amotivational syndrome," which he described as a passive state where the affected individual loses interest in things that are traditionally important to the "older generation." Nevertheless, this effect cannot serve as a valid basis for legislation. A society which cherishes individual freedom may not justify regulations solely on the need to maintain the existing order of moral, economic and social values.

The State's other expert witness also failed to substantiate the claim that marihuana is harmful to the user. Dr. Louis J. Casarett, Professor of Pharmacology at the University of Hawaii, when asked on cross-examination whether he considered marihuana to be a dangerous drug answered in the negative[7] and, on further questioning, stated that he did not know

[7]On direct examination Dr. Casarett did testify that one of the active ingredients in marihuana, tetrahydrocannabinol (THC) could be considered a dangerous material because it might produce aberrant behavior in a fraction of its users. Subsequently, Dr. Casarett clarified this testimony by stating that this opinion was related to the use of the drug THC, rather than to the smoking of marihuana as such.

of a single documented case of death due to the smoking of marihuana. By contrast, Dr. Casarett did testify that he considered aspirin to be a dangerous drug, which caused a certain number of fatalities among its users.

This testimony substantiates the opinion of other scholars in the field of marihuana use that harm to the user is not a conclusive fact, but speculative or a slight risk at best. L. GRINSPOON, supra at 347. Under the standard laid down in *State v. Lee, supra,* mere speculation cannot form a valid basis for the government's use of its police power to protect a person from his own actions. Therefore, this ground is insufficient to justify the State's intrusion into the privacy of the appellants.

The State also argues that the use of marihuana may contribute to the commission of crimes and that, therefore, personal possession of the drug is lawfully prohibited. Again the evidence in this area appears to be highly speculative. The State relies upon studies conducted in India, Latin America and Greece, which may not be readily transferrable to the United States because of the differing economic and social conditions.[8] On the other hand, studies which have been conducted in the United States, such as the La Guardia Study, conclude that marihuana is not a determining factor in the commission of crimes. L. GRINSPOON, *supra* at 308-11. Given this present degree of knowledge, I would concur in the principle ex-

[8] See J. KAPLAN, MARIJUANA—THE NEW PROHIBITION 98-136 (1970) for a critique of the reliability of these and other studies linking marihuana use and antisocial behavior.

pressed by the United States Supreme Court in *Stanley v. Georgia*, 394 U.S. 557, 566-67 (1969), which held that the mere private possession of obscene materials cannot constitutionally be made a crime:

> [I]f the State is only concerned about printed or filmed materials inducing antisocial conduct, we believe that in the context of private consumption of ideas and information we should adhere to the view that "[a]mong free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law . . . ."

Thus, I would hold that the State has failed to demonstrate sufficient justification for its intrusion into the privacy of the individual with respect to the personal use of marihuana. The State cannot prevail except under the test described by Mr. Justice Goldberg in his concurring opinion in *Griswold v. Connecticut*, 381 U.S. 479, 497 (1965):

> In a long series of cases this Court has held that where fundamental personal liberties are involved, they may not be abridged by the States simply on a showing that a regulatory statute has some rational relationship to the effectuation of a proper state purpose. "Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling," *Bates v. Little Rock*, 361 U.S. 516, 524. The law must be shown "necessary, and not merely rationally related, to the accomplishment of a permissible state policy." *McLaughlin v. Florida*, 379 U.S. 184, 196. See *Schneider v. Irvington*, 308 U.S. 147, 161.

In his concurring opinion, my Brother Abe recognizes that the State would ordinarily bear the burden of proving that the use of marihuana is harmful to the general public in order to justify prohibiting its use through the exercise of the police power. He argues, however, that since the appellants conceded that the State may regulate the use of marihuana, the State was relieved of its obligation to prove social harm. Apparently, he believes that the issue of the State's power to prohibit was not controverted, and that, therefore, the State was not put on notice that it had to prove social harm as part of its case.

The record, however, belies this argument. The appellants specifically distinguished in their brief between the State's power to regulate the use of marihuana (as in the case of such substances as alcohol and tobacco) and its power to prohibit altogether. Regulation and prohibition are not coextensive. Furthermore, the State's presentation in the circuit court was replete with attempts to prove a nexus between the use of marihuana and harm to the user as well as a propensity toward anti-social behavior and the commission of crime. The circuit court repeatedly refused to limit the controversy to the reasonableness of the classification of marihuana as a narcotic. The suggestion that the State was relieved of its obligation to establish social harm is unrealistic.

I wish to make it clear that the views expressed in this opinion apply only to the private conduct of individuals. The vice of the present statute springs from the license it gives to the State to violate a

person's reasonable expectation of privacy. Where conduct is public in nature, however, society has a greater claim to the right of control and the State need not show as compelling an interest in its prohibition. Moreover, this analysis is not meant to imply a right to the personal use of other prohibited drugs, such as heroin and other narcotics, which are not involved in this case.

Finally, it should be stressed that the analysis I have adopted does not seek to establish this court as a super-legislature, exercising veto power over the wisdom and value of legislative policies. *See Griswold v. Connecticut, supra* at 512 (Justice Black's dissenting opinion). Any criticism which attempts to deter courts from inquiring into the constitutionality of laws must distinguish between legislation which seeks to regulate economic and social relationships and that which intrudes into the purely private sphere of human life. In the former instance courts rightfully grant the legislature wide latitude for experimentation in the promotion of the general good. But, where the State endeavors to intrude into the individual's private life and regulate conduct having no public significance, it is the duty of the courts to offer a haven of refuge where the individual may secure vindication of his right to be let alone.

DISSENTING OPINION OF KOBAYASHI, J.

Just as it is a valid exercise of the State of Hawaii's police-power to regulate the sale, use, and possession of such commodities as alcohol and tobacco, it is axiomatic that the regulation of marijuana is also a valid state activity. I feel, however, that our present method of regulating marijuana—inclusion of marijuana within the classification of criminally proscribed narcotics—is unreasonable and unconstitutional in violation of the due process and equal protection clauses of the Fourteenth Amendment.

We have in the past in reviewing statutory classifications recognized that "it is the duty of this court to see that the legislature does not seek to achieve noble ends by unconstitutionally arbitrary means". *Hasegawa v. Maui Pineapple Co.*, 52 Haw. 327, 331, 475 P.2d 679, 682 (1970). Even if I felt that the legislature's present treatment of marijuana achieved a noble end, which I do not, HRS § 329-5, which proscribes the use of narcotics and classifies marijuana as a narcotic, must be regarded as an unconstitutionally arbitrary legislative declaration tantamount to an abuse of the state's police-power.

The equal protection clause has been construed by the U. S. Supreme Court so as to require that criminal statutory classification schemes cover all persons or things related to each other reasonably, logically or scientifically where their inclusion in the classification is necessary to effectuate the legislative purposes of the statute. *McLaughlin v. Florida*, 379 U.S. 184 (1964); *Skinner v. Oklahoma*, 316 U.S. 535

(1942). The Supreme Court of Washington, citing *Skinner* in construing Washington's narcotic statute, said that "[i]t is doubtful whether a legislative declaration contrary to all the evidence can be sustained as constitutional, if its effect is to deny a defendant equal treatment under the law." *State v. Zornes,* 78 Wash.2d 9, 20, 475 P.2d 109, 116 (1970). There has been shown no valid rational basis for including marijuana within the narcotic statute. Nor are there reasonably logical or scientific grounds for such a classification. On the contrary, the rationale for not including marijuana within HRS § 329-5 far outweighs the traditional arguments that support its continued inclusion.

Presumptively the statutory purpose sought to be attained by including marijuana within the classification of proscribed narcotic drugs stems from the following reasons: 1) that marijuana's use is per se harmful to the user, 2) that the use of marijuana is a stepping-stone to more serious drugs, 3) that the effects of consuming marijuana are sufficiently related to the effects of consuming narcotics, 4) that the use of marijuana leads to criminal activity. These postulations have simply not been borne out. The findings from the evidence adduced indicate that none of the above rationale bears a reasonable relation to the inclusion of marijuana within the narcotic classification.

The Washington Court in Zornes, *supra,* cites an article appearing in an official publication of the federal courts as describing the effects of marijuana:

Acute physical symptoms frequently include conjunctival vascular injection, dryness of the mouth and pharnyx, irritation of the throat, increased sensitivity to light, sound, touch, and pain stimuli, and such changes in the autonomic nervous system as increase in pulse, blood pressure, and tendon reflexes. Ataxia, the impaired ability to coordinate voluntary muscular movements, may also occur. Appetite is often stimulated. There is no evidence that marihuana increases sexual potency. There are as yet no recnogized lasting ill effects directly attributed to the brief use of marihuana nor has a death been reported in this country due to overdosage.

The mental changes following marihuana use are variable and depend in part upon the expectations and prior drug experience of the user and the social setting at the time of use; thus, the meaning of the experience is largely socially acquired. *Marihuana is primarily classified as a hallucinogen even though intoxication may include both early stimulant and later depressant effects.* A decreased sense of fatigue, relaxation, and increased self-confidence has been described. There may be a distortion of affect toward omnipotency and a perception of "insight" rarely shared by the unintoxicated. The individual is often garrulous, giggly, and talk is disconnected. Associated with a period of euphoria, or well-being, there may be distortions of time, space, color, and other sensory perception with increased dosage.

Depersonalization, the perception of the physical body as not self, has been described with use. While this distortion might be expected to in-

crease the likelihood of self-injury, we know of no documentation to confirm this expectation.

Increased suggestibility, decreased judgment, and change of affect may be followed by depression and sleep. There may also be delusions, hallucinations, suspiciousness, panic, and fear of death. Violent or aggressive behavior is unusual. While occasional persons may be especially sensitive to even small doses, with the result that a psychotic-like state is produced, there is recent evidence that almost all persons are so affected with sufficient dosage. A puzzling observance is that many of the persons who have had frightening episodes in their marihuana experience wish to repeat it.

In summary, the acute effects of marihuana smoking commonly include a euphoric state accompanied by motor excitation and mental confusion. These reactions are often followed by a period of dreaminess, depression, and sleep. The wide variety of individual reactions appears to be more closely related to personality differences (including expectations and emotional arousal) and the cultural setting of use than to any specific property of the drug itself. Recognizing this variability, one user remarked that "every person has the dream he deserves." (Italics ours.) (Footnote omitted.) D. Pet, M.D., and J. Ball, Ph.D., Marihuana Smoking in the United States, 32 Federal Probation 8 (No. 3, 1968), published by the Administrative Office of the United States Courts in Cooperation with the Bureau of Prisons of the Department of Justice, Washington, D. C.; *see also* A. Lindesmith, The Addict and the Law, Indiana University Press (1965), at 222-242.

> *The consensus is that cannabis* [marijuana] *is not a narcotic but rather is a mild hallucinogenic* and that it has a stimulating and depressant effect on the central nervous system. Zornes, *supra,* 475 P.2d at 114-15. (Emphasis added.)

The plurality states that the evidence in this case shows "that marijuana has many of the properties of a narcotic, scientifically defined". The manner in which the plurality construes the evidence presented on this issue is untenable. It is conceded that the phenomenon of "tolerance" (over time increasingly larger doses required to achieve the same initial effect) and "physiological dependence" (symptoms of salivation, nausea, convulsions and extreme pain accompany the withdrawal of the drug to the user) and the ability to cause death through respiratory paralysis "are properties of narcotics, scientifically defined, but are not properties of marijuana." The only support that can be found for the position that marijuana has any of the properties of a narcotic is the contention that it may relieve pain in small doses, produce stupor, and invoke sleep in higher doses as do narcotics. Surely when comparing the properties and characteristics solely attributable to hard narcotics such as heroin, morphine, or cocaine with those jointly held by marijuana and narcotics a distinction becomes apparent between the severity of the respective causal effects. The evidence indicates that the harms produced by the abusive use of marijuana are essentially of the same nature and quality as those produced by the abusive use of alcohol. As such, the failure to in-

clude alcohol within the criminally proscribed statutory classification could itself be considered violative of equal protection.

It is evident that much research into the long term effects of consuming marijuana is presently needed. As yet, however, it has not been shown that consumption of marijuana is any more harmful than a comparable consumption of alcohol and it is doubtful that the presently known effects of marijuana are as adverse as those of alcohol. Until legitimate research indicates otherwise, the harm created by placing a criminal sanction on the activity of a significant percentage of our population who would otherwise be law abiding citizens far outweighs any present benefit to be derived from the effects of classifying marijuana as a narcotic. There is no logical or otherwise rational reason for our society, on the basis of a law that has little or no merit in its application, to continue to make criminals out of and consequently alienate the youth of today.

The use of marijuana does not cause the social ills that the legislature has attempted to guard against. It is the present status of the law classifying marijuana as a narcotic and proscribing its use as a narcotic that is responsible for the social harm created. Organized crime is greatly benefitted by the fact that possessing, using, and trafficking in marijuana have been made illegal. Marijuana's illegality merely adds another weapon to the armory of the underworld for the exploitation of society, just as do prostitution, gambling and other prohibited activity. The difference

is that the latter activities are justifiably proscribed while the benefit if any of making marijuana illegal is far outweighed by the consequential social detriment. It is a popular contention that the supplying and marketing of marijuana is done on a low-key individual basis. This position is probably not now applicable to the State of Hawaii. It is contended that the underworld has adopted the practice of controlling the supply of marijuana so that it can withdraw marijuana completely in a given area, simultaneously encouraging the users of marijuana to switch to codeine pills and then to heroin, resulting in a substantial monetary gain for organized crime.[1] While it has been shown that the use of marijuana itself is not addictive and does not necessarily lead to the use of narcotic drugs, the addition of criminal elements bearing pressure on the marijuana user to switch to narcotics creates a substantial danger of increasing the number of narcotic users.

It is suggested that a more reasonable and rational approach in this area would be to regulate marijuana in a manner similar to that of alcohol or tobacco. In this way the abusive use of marijuana, not its reasonable use, would be given criminal sanctions. Such a change of the law in this area would instill the respect of society that is needed for the preservation of criminal justice and prospectively decrease the criminalization of our younger generation.

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[1]Hunter, Sunday Star-Bulletin & Advertiser, July 25, 1971, § A, at 1. *But see* Honolulu Advertiser, July 26, 1971, § A, at 1.

Appendix B

ORDER DENYING PETITION FOR REHEARING

In the Supreme Court of the State of Hawaii
October Term, 1971

State of Hawaii, Plaintiff-Appellee, v. Paul Lorin Kantner, Defendant-Appellant

No. 4995

and

In re Application of David Allen Nowell and Claude Ernest Winter, Petitioners-Appellants, for Writ of Habeas Corpus, etc.

No. 5005

PETITION FOR REHEARING
February 25, 1972

RICHARDSON, C.J., MARUMOTO, ABE, LEVINSON and KOBAYASHI, JJ.

Per Curiam. The petition for rehearing is denied without argument.

Levinson and Kobayashi, JJ., having dissented from the opinion of the court, do not concur.

Hyman M. Greenstein
for the petition.

Appendix C

ORDER DENYING AMENDED PETITION FOR REHEARING AND STAY OF ISSUANCE OF MANDATE

In the Supreme Court of the State of Hawaii
October Term, 1971

State of Hawaii, Plaintiff-Appellee, v. Paul Lorin Kantner, Defendant-Appellant
No. 4995

and

In re Application of David Allen Nowell and Claude Ernest Winter, Petitioners-Appellants, for Writ of Habeas Corpus, etc.
No. 5005

PETITION FOR REHEARING
April 10, 1972

RICHARDSON, C.J., MARUMOTO, ABE, LEVINSON and KOBAYASHI, JJ.

Per Curiam. The petition filed herein on February 28, 1972 and amended on April 5, 1972 for rehearing and stay of issuance of mandate is denied without argument.

Levinson and Kobayashi, JJ., having dissented from the opinion of the court, do not concur.

Hyman M. Greenstein
for the petition.

Appendix D

SUMMARIES OF RECENT REPORTS, STUDIES AND STATEMENTS CONCERNING MARIJUANA

I. Excerpts from the Legislative History of the Comprehensive Drug Abuse Prevention and Control Act of 1970 P.L. 91-513 (3 U.S. Cong. and Adm. News '70 4577).

. . . .

MARIHUANA

The extent to which marihuana should be controlled is a subject upon which opinions diverge widely. There are some who not only advocate its legalization but would encourage its use; at the other extreme there are some States which have established the death penalty for distribution of marihuana to minors. During the hearings, Dr. Stanley F. Yolles, who was the Director of the National Institute of Mental Health, submitted a chart of fable and fact concerning marihuana. That chart is as follows:

MARIHUANA

FABLE	FACT
1. Marihuana is a narcotic.	1. Marihuana is not a narcotic except by statute. Narcotics are opium or its derivations (like some synthetic chemicals with opium-like activity).
2. Marihuana is addictive.	2. Marihuana does not cause physical addiction, since tolerance to its effects and symptoms on sudden withdrawals does not occur. It can produce habituation (psychological dependence).

FABLE	FACT
3. Marihuana causes violence and crime.	3. Persons under the influence of marihuana tend to be passive. It is true that sometimes a crime may be committed by a person while under the influence of marihuana. However, any drug which loosens one's self-control is likely to do the same and relates primarily to the personality of the user.
4. Marihuana leads to increase in sexual activity.	4. Marihuana has no aphrodisiac property.
5. Marihuana is harmless.	5. Instances, of acute panic, depression, and psychotic states are known, although they are infrequent. Certain kinds of individuals can also become over-involved in marihuana use and can lose their drive. We do not know the effects of long-term use.
6. Occasional use of marihuana is less harmful than occasional use of alcohol.	6. We do not know. Research on the effects of various amounts of each drug for various periods is underway.
7. Marihuana use leads to heroin.	7. We know of nothing in the nature of marihuana that predisposes to heroin abuse. It is estimated that less than 5% of chronic users of marihuana go on to heroin use.
8. Marihuana enhances creativity.	8. Marihuana might bring *fantasies* of enhanced creativity but they are illusory, as are "instant insights" reported by marihuana users.
9. More severe penalties will solve the marihuana problem.	9. Marihuana use has increased enormously in spite of the most severely punitive laws.
10. It is safe to drive while under the influence of marihuana.	10. Driving under the influence of any intoxicant is hazardous.

* * * *

II. Marijuana—a Signal of Misunderstanding (First Report of the National Commission on Marihuana and Drug Abuse, March, 1972).

The National Commission on Marihuana and Drug Abuse submitted its first report to the President and Congress on March 22, 1972. Its purpose was to "demythologize" the controversy surrounding marihuana, to bring uniformity and rationality into the marijuana laws, and to seek to restore credibility in this area. (Transmittal letter by Raymond P. Shafer, Chairman).

The Commission reported that about 24,000,000 Americans over the age of 11 years have used marijuana at least once (including 20% of the 18-21 year olds and 38% of the 22-25 year olds) (p. 33), but that 41% of the adults and 45% of the youth who have ever used marijuana reported that they no longer used the drug. (P. 34). The process of becoming a marijuana user is not a "seduction of the innocent" (p. 41); those who use it are fundamentally the same persons, socially and psychologically, as those who use alcohol and tobacco. (P. 42). The majority of persons using marijuana progress no further and often discontinue its use. (P. 44). Much of the marijuana selling takes place at the customer level between friends, and involves little profit and relatively small quantities of the drug. (P. 47).

Marijuana is in fact regarded as a "cool" drug and used for its social and calming effects by those in the black and Spanish speaking ghettos who also use heroin. (P. 48). Whether marijuana leads to other

drug use depends on the individual, on the social and cultural setting in which the drug use takes place, and on the nature of the drug market. Such use, is neither inevitable nor necessary. (P. 49). The factors of "set" (the users' own personality, background, expectations, and mood) and "setting" (the external environment and social context) are most influential in determining the effects of marijuana use, in view of its "minimal physical and subtle subjective mental effects." These factors can result in the belief that a marijuana user is experiencing a "high" even when he is given a non-marijuana substance (placebo) but is told it is marijuana. (Pp. 51-52).

Although a large amount of research has been performed in man and animals regarding the immediate effect of marijuana on bodily processes, no conclusive evidence exists of any physical damage, disturbances of bodily processes, or proven human fatalities attributable solely to even very high doses of marijuana. (P. 57). Low to moderate doses of the drug produce minimal measurable transient changes in bodily functions. Marijuana intoxication produces only minimal, transient changes of rapid onset and short duration in brain waves. *(Id.)*. Animal studies have shown that the margin of safety between active doses and toxic doses is enormous. (P. 60). The marijuana experience is "overwhelmingly pleasurable" for most users who continue to use it. Abrupt withdrawal does not lead to any specific or reproducible abstinence syndrome; physical dependence has not been demonstrated in man or in animals. (P. 62).

A Boston study found no evidence of physical dependence or signs of withdrawal and no harmful effects on bodily functions, motor functions, mental functions, personal or social behavioral or work performance. (P. 63). Other studies have found that the so-called "amotivational syndrome" affecting a very heavy using population has not been sustained by the actual experimental evidence. (P. 64).

There is also a growing uncertainty as to the existence of any causal link between marijuana use and anti-social conduct. (P. 69). Recent studies have shown that large segments of the law enforcement and criminal justice communities are no longer willing to assert a cause-effect relationship between these activities, but observe instead only a statistical association. *(Id.)*. In a Commission-sponsored survey, no findings indicated that marijuana is generally or frequently used immediately prior to the commission of a very small number of offenses by marijuana users. Aggressive and violent offenders reported the use of alcohol within 24 hours prior to the offense with significantly greater frequency. (P. 73). Another study has shown that marijuana users are much less likely to commit aggressive or violent acts than were those who preferred amphetamines or alcohol, that marijuana users conditioned themselves to avoid aggressive behavior even in the face of provocation, and that marijuana played a significant role in users' transition from a "rowdy" to a "cool, non-violent" style. *(Id.)*. The weight of the evidence is that marijuana will not cause or lead to the commission of violent, aggressive

behavior; if anything, it serves to inhibit the expression of such behavior. Marijuana-induced relaxation of inhibitions is not ordinarily accompanied by aggressive or aggravation of aggressive tendencies. *Id.*

The Commission found that marijuana is not generally viewed by participants in the criminal justice community as a major contributing influence in the commission of delinquent or criminal acts. (P. 75). It also found that neither informed professional opinion nor empirical research has produced systematic evidence to support the thesis that marijuana use, by itself, either invariably or generally leads to or causes crime. The evidence instead suggests that the apparent statistical correlation between marijuana use and crime or delinquency is caused by sociological and cultural variables. (P. 76). Although marijuana has produced some interference with certain motor and mental abilities affecting driving behavior, these effects are readily overcome by the exercise of extreme caution by the driver and a significant reduction in speed. (P. 79).

The Commission found no single documented human fatality in the United States proven to have resulted solely from the ingestion of marijuana (p. 83) and no reliable evidence that marijuana causes genetic defects in man. (P. 84). Studies in other countries have also found no evidence of chromosome damage or other adverse genetic effects due to marijuana use in populations of chronic users. *(Id.)*. The immediate effects of marijuana intoxication on the body's organs or functions are of little significance, are by and large

transient, and have little or no permanent effect on the individual. No objective evidence of injury to brain tissue has been documented, contracting with the well established brain damage of chronic alcoholism. No outstanding abnormalities and psychological tests, psychiatric interviews, or coping patterns have been conclusively documented. (P. 85).

Marijuana is not in the same chemical category as heroin insofar as its physiologic and psychological effects are concerned. It does not lead to physical dependence; no tortuous withdrawal syndrome follows the cessation of even chronic, heavy use. Although there may be some psychological dependence by heavy, long term users, the level of psychological dependence is no different from the similar syndrome seen in the withdrawal from tobacco cigarettes. Marijuana does not lead to physical dependence. (P. 87).

The Commission found that marijuana users are not social isolationists or severely disturbed individuals in need of treatment or confinement; their general image of themselves is not radically different from that of their non-marijuana using peers. (P. 96). It found no evidence to suggest that the majority of youth are unwilling or incapable of productive and disciplined work performance. (P. 101). The Commission concludes that the use of marijuana by youth is a "relatively minor change in social patterns of conduct and is more of a consequence of than a contributor to these major changes [in such areas as economics, politics, religion, and family life] . . . marijuana does not emerge as a major issue or threat to the social order

. . . it is unlikely that marijuana will affect the future strength, stability, or vitality of our social and political institutions." (P. 102).

Based on its own thorough studies, observations, and experience, and after reviewing all the available evidence, the Commission has recommended that distribution in private of small amounts of marijuana for no remuneration or insignificant remuneration not involving a profit should no longer be an offense and that distribution of small amounts of marijuana in public for little or no remuneration not involving a profit would be an offense punishable only by a fine of $100. (P. 154).

* * * *

III. Statement of Dr. Jesse L. Steinfeld, Surgeon General and Deputy Assistant Secretary for Health and Scientific Affairs, before the National Commission on Marijuana and Drug Abuse, August 23, 1971.

Dr. Steinfeld testified that treating marijuana in the same category as hard narcotics is neither scientifically defensible nor legally effective or enforceable. (P. 4). Marijuana has been used by man for millenia. It is second only to alcohol in global usage, with more than 200,000,000 persons having used it. (Pp. 1-2). As commonly used in America, marijuana is a comparatively mild, non-addicting hallucinogen, the subjective affects of which are variable, depending on the amount and quality of the drug, the setting in which it is used, and the expectations and experience of the user. *(Id.)*.

The legal penalties in marijuana control legislation were originally assigned with total disregard for the medical and scientific evidence about the properties of the drug or its effect; Dr. Steinfeld knew of "no clearer instance in which the punishment for an infraction of the law is more harmful than the crime." (Pp. 15-16). Dr. Steinfeld testified that marijuana is not the "horror" it is alleged by some to be, but that it should continue to be controlled with penalties for its use consistent with the danger and risk to the individual and society. (Pp. 16-17).

* * *

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1971

No. 71-1558

PAUL LORIN KANTNER, CLAUDE ERNEST WINTER
and DAVID ALLEN NOWELL,
Petitioners,

VS.

STATE OF HAWAII and ANTONE S. OLIM,
Superintendent of Hawaii State Prison,
Respondents,

On Petition for a Writ of Certiorari to the Supreme Court of Hawaii

BRIEF FOR RESPONDENT ANTONE S. OLIM, Superintendent of Hawaii State Prison

OPINION BELOW

The opinion of the Supreme Court of Hawaii is reported at 493 P.2d 306.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTIONS PRESENTED

Whether the regulation and classification of marijuana accomplished by Sections 329-1 and 329-5, Hawaii Revised Statutes, violate the due process or equal protection clauses of the 14th Amendment or infringe on any federally protected fundamental right.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The United States Constitution, Amendment 14, provides in part:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 329-1, Hawaii Revised Statutes, provides in part:

> "'Narcotic drugs' mean any of the following, whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis:
>
> "(1) Opium, isonipecaine, coca leaves, and opiate;
>
> "(2) Any compound, manufacture, salt, derivatives, or preparation of opium, isonipecaine, coca leaves or opiate;
>
> "(3) Any substance (and any compound, manufacture, salt, derivative, or preparation thereof) which is chemically iden-

tical with any of the substances referred to in clauses (1) and (2), including apomorphine or any of its salts;

"(4) Opiates. The word 'opiate' as used in clauses (1) and (2) shall mean any drug having addiction-forming or addiction-sustaining liability similar to morphine or cocaine;

"(5) Marihuana. Marihuana includes the following substances under whatever names they may designate: all parts of the plant cannabis sativa, L., whether growing or not, the seeds thereof, the resin extracted from any part of the plant, and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or resin, but, shall not include the sterilized seed of the plant which is incapable of germination."

Section 329-5, Hawaii Revised Statutes, provides:

"No person shall knowingly plant, cultivate produce, manufacture, possess, have under his control, prescribe, administer, or compound any narcotic drug as defined by section 329-1 except as provided in this chapter. Any person found guilty of any of the foregoing acts shall be imprisoned at hard labor not more than five years for the first offense and imprisoned at hard labor not more than ten years for any subsequent offense; provided that, every person who possesses any marijuana, except as otherwise provided by law, shall be punished by imprisonment for not more than one year, or for not less than one year nor more than five years.

"If such person has been previously convicted once of any felony offense described in this chapter or has been previously convicted once of any offense under the laws of any other state or of the United States which if committed in this State would have been punishable as a felony offense described in this chapter, the previous conviction shall be charged in the indictment or information and if found to be true by the jury, upon a jury trial, or is found to be true by the court, upon a court trial, or is admitted by the defendant, he shall be imprisoned for not less than two years nor more than ten years, and shall not be eligible for release upon completion of sentence, or on parole, or on any other basis until he has served not less than two years.

"If such person has been previously convicted two or more times of any felony offense described in this chapter or has been previously convicted two or more times of any offense under the laws of any other state or of the United States which if committed in this State would have been punishable as a felony offense described in this chapter, the previous convictions shall be charged in the indictment or information and if found to be true by the jury, upon a jury trial, or if found to be true by the court, upon a court trial, or are admitted by the defendant, he shall be imprisoned for not less than five years nor more than twenty years, and shall not be eligible for release upon completion of sentence, or on parole, or on any other basis until he has served not less than five years."

STATEMENT OF THE CASE

Respondent Olim generally agrees with the Petitioners' summary of the historical background of the case. However, Respondent Olim disagrees that the expert testimony adduced by Petitioners "clearly and unequivocally demonstrated that scientifically, medically, or in fact no basis existed for equating marijuana and narcotic drugs." (Op. Br. 5)

Respondent Olim further disagrees that the court's holding in *People v. McCabe,* 49 Ill.2d 338, 275 N.E. 2d 407 (1971), was the opposite result from that reached by the Hawaii Supreme Court (Op. Br. 6). This is discussed in the Argument herein.

In addition, during the hearing, the State of Hawaii adduced evidence that there is a lack of knowledge about the chemical, physiological and psychological effects of marijuana usage (Tr. 16, 27, 28, 37, 47, 99, 133); that the use of marijuana (a) may create a psychological dependence (Tr. 78, 92, 93, 141, 142, 143); (b) may create social and psychological pressures to experiment with more dangerous, addictive drugs and may facilitate transition to such drugs (Tr. 31, 36, 37, 38, 116); (c) may produce psychosis in individuals with a predisposition to mental instability (Tr. 17, 81, 85, 88, 91, 145, 146); (d) may produce a motivational syndrome of lethargy, self-neglect and non-productivity (Tr. 17, 88, 89, 116, 119, 131, 132); and (e) may cause mental disassociation and intoxication that pre-disposes to anti-social behavior (Tr. 19, 22, 23, 79, 80, 89, 117, 118, 146, 147).

ARGUMENT

I. THE REGULATION OF MARIJUANA ACCOMPLISHED BY SECTIONS 329-1 AND 329-5, HAWAII REVISED STATUTES, IS A REASONABLE EXERCISE OF THE POLICE POWER.

A. The Hawaii State Legislature has provided for markedly different treatment of marijuana than for narcotics, scientifically defined.

Petitioners repeatedly complain that the method of regulation of marijuana accomplished by the statute in question is irrational because it is treated in the same manner as narcotics, scientifically defined.

This argument mistakes the facts.

Petitioners conveniently ignore that, with respect to possession, the offenses here involved, the Hawaii State Legislature has set forth markedly different penalties than it has established for possession of narcotics, scientifically defined. Under Section 329-5, Hawaii Revised Statutes, the convicted possessor of marijuana may be punished by imprisonment for a period of not more than one year as contrasted with a period of not more than five years for possessors of other proscribed drugs.

Thus Petitioners' arguments as to the unreasonableness of classifying marijuana with narcotics rest on a fallacious assumption.

B. The criminal sanction for the possession of marijuana imposed by the statute in question is a reasonable means of discouraging its use which is a valid state objective.

At the outset it must be emphasized that Petitioners conceded below that the State may regulate the use of marijuana under its police power.

The remaining question is whether the manner in which marijuana is regulated is reasonable. If there exists *some* evidence on the basis of which the Hawaii State Legislature could enact the statute, then the statute must stand under the due process clause. *Ferguson v. Skrupa,* 372 U.S. 726 (1963).

There can be little question that Petitioners failed to meet this heavy burden. At best the record indicates that Petitioners were able to show that presently there are widely divergent and hotly disputed theories, studies and opinions concerning the effects of marijuana. This Court, as did the Supreme Court of Hawaii, should leave the weighing of such theories, studies and opinions to the Legislature. As Mr. Justice Black stated in *Ferguson:*

> "We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws." (372 U.S. at 730)

Obviously the legislative process, with its ability to weigh such varied viewpoints and then make value judgments, is the process through which Petitioners' contentions should be resolved.

In *Commonwealth v. Leis,* 355 Mass. 189, 243 N.E. 2d 898 (1969), a case also dealing with the prohibition of marijuana, the Supreme Judicial Court of Massachusetts dealt squarely with the question:

> "Where the reasonableness of the legislative finding or the factual basis of the legislative finding is fairly debatable the legislative determination must be sustained . . . That there may

> be an earnest conflict of serious opinion does not suffice to bring matters of legislative judgment within the range of judicial cognizance." (243 N.E.2d at 907)

Nor is imposition of a criminal sanction itself an unreasonable means of regulation. Such sanctions are the traditional, and most effective, means by which the use of dangerous substances is discouraged.

There can be little doubt that the Legislature's purpose of preventing the use of marijuana is a legitimate state objective. In view of the divergent viewpoints regarding the effects of the drug, the Legislature certainly should be able to preclude its use altogether. To do otherwise would be to run a substantial risk with public health before more is known about the drug. Indeed the absence of sound scientific data concerning the long-term effects of marijuana begs for a cautious approach.

C. Mere labeling of marijuana as a narcotic drug does not offend due process.

Petitioners complain that the statute in question classifies marijuana as a narcotic drug, that it is not scientifically a narcotic, and that the statute is therefore unconstitutional.

This contention is without merit.

Mere labeling of marijuana as a narcotic drug is immaterial to a determination of constitutional validity because the statute expressly proscribes its possession. "Narcotic drugs" is not used in any generic sense, but only as expressly defined by Section 329-1,

Hawaii Revised Statutes. The Hawaii State Legislature has broad power to define terms for a particular legislative purpose, and the courts, generally speaking, are obligated to follow legislative definitions rather than commonly accepted dictionary, judicial or scientific definitions. *Bailey's Bakery, Ltd. v. Borthwick,* 38 Haw. 16 (1948).

Use of the word "narcotic" to include marijuana is certainly not misleading because the word in popular usage does include marijuana. Use of the popular rather than the scientific definition does not constitute a violation of the 14th Amendment's guarantee of due process.

II. THE CLASSIFICATION OF MARIJUANA ACCOMPLISHED BY THE STATUTE IN QUESTION IS NOT OFFENSIVE TO THE EQUAL PROTECTION CLAUSE.

Petitioners argue that since Section 329-5, Hawaii Revised Statutes, classifies marijuana with "hard drugs", it violates the equal protection clause.

Their contention is not even one cognizable under the equal protection clause which precludes the states from treating persons who are similarly situated differently. Here Petitioners complain that the statute treats marijuana users in the *same* manner as users of more dangerous drugs, a contention which incidentally is contrary to the facts as has been discussed.

Nonetheless, the real equal protection question should be mentioned because it was dealt with by the

Supreme Court of Hawaii. That question is whether the failure to include alcohol within the same classification as marijuana is violative of equal protection.

As pointed out below, the issue in this regard is not whether marijuana is more like alcohol than heroin but whether there are sufficient dissimilarities to support different treatments.

Far more is known concerning the long-term effects of the use of alcohol than is known concerning the same effects of marijuana. Despite its alleged widespread use, marijuana constitutes a relatively new drug abuse problem. Alcohol, on the other hand, has been a problem for centuries. The wide disparity of knowledge of the drugs alone constitutes a sufficient basis for different treatment.

Additionally, alcohol, unlike marijuana, can be readily manufactured in any kitchen. Indeed, the experience of this country in connection with its prohibition shows that its regulation in that manner may as a practical matter be impossible. The growing and marketing of marijuana on the other hand can be prohibited under the police power of the states.

In any event there can be little question that Petitioners have utterly failed to show that different treatment of alcohol rests on no reasonable basis. That is their burden under the law. *Lindsley v. Natural Carbonic Gas Co.,* 220 U.S. 61 (1911).

III. THE USE OF MARIJUANA INVOLVES NO "FUNDAMENTAL CONSTITUTIONAL RIGHT" AS SUGGESTED BY PETITIONERS AND, EVEN IF IT DOES, THE QUESTION SHOULD NOT BE DECIDED ON THIS RECORD.

It bears repeated emphasis that below Petitioners consistently conceded the State's power to regulate the possession of marijuana, and relied only on the argument that marijuana is not a narcotic and cannot be included in a regulatory scheme dealing with narcotics.

Even if the use of marijuana were included within a fundamental right of privacy, which it is not, the State could nonetheless justify its prohibition by presenting evidence to show that the Legislature could have reasonably concluded that its use is harmful to the general public as well as to the individual user. But, in view of Petitioners' concession, the State had no reason to produce evidence tending to show such facts. Thus, if this question is to be decided by this Court, it should await a record adequate for the purpose.

It is noteworthy that Justice Abe in his concurring opinion refused to decide the issue for this reason, despite his obvious sympathy for the proposition that one enjoys a constitutional right to smoke marijuana. (493 P.2d at 311-313)

In any event, the Supreme Court of Hawaii was clearly correct in holding that an individual's interest in using marijuana is not within the group of interests to which the Constitution affords the highest protection.

Petitioners cite no authority for the novel proposition that the ingestion of marijuana lies within a fundamental right of privacy. They cite *Griswold v. Connecticut,* 381 U.S. 479 (1965), in which this Court extended the zone of privacy to the marital relationship, and invalidated a statute prohibiting the use of contraceptives. But to prohibit invasions of the marital chamber, and thus protect the centuries-old institution, is hardly to authorize the use of mind-altering substances, even in private. The prohibition of marijuana does not operate "directly on an intimate relation of husband and wife" as in *Griswold,* nor does it operate on any other intimate relationship. Further, in *Griswold,* contraceptives were admittedly not harmful to the individual user much less the general public.

Under our system the states, unlike the federal government, are limited in the exercise of their authority only by explicit constitutional limitations on their power. Petitioners must point to some provision of Bill of Rights or elsewhere which can rationally be construed as limiting the power of the states to prohibit the possession of marijuana. They have not and cannot do this.

IV. THERE ARE NO CONFLICTS OF DECISIONS

The Petitioners' contentions have been raised in a number of jurisdictions and have uniformly been decided against them.

In *Raines v. Florida,* 225 So.2d 330 (Fla. 1969), the court held marijuana was within the category of injurious substances which may be prohibited in the exercise of the police power, and that no rights are violated thereby. In *People v. Stark,* 400 P.2d 923 (Colo. 1965), and *Spence v. Sacks,* 173 Ohio St. 419, 183 N.E.2d 363 (1962), the courts held it was not unreasonable to include marijuana within a legislative definition of narcotic drugs and that such action was constitutional. In *Commonwealth v. Leis, supra,* the court followed *Raines, Stark* and *Spence,* and went on to hold there is no fundamental right to use marijuana and that its use is not within a constitutionally protected zone of privacy created by the First, Third, Fourth, Fifth and Ninth Amendments. Finally, in *People v. Aguiar,* 257 Cal.App.2d 597, 65 Cal.Rptr. 171, cert. den. 393 U.S. 970 (1968), a legislative classification of marijuana as a narcotic was upheld as reasonably related to the public welfare.

Petitioners cite *People v. McCabe, supra,* for the proposition that statutes classifying and proscribing marijuana as a narcotic are constitutionally defective. (Op. Br. 6, 14) That case, however, held only that the Illinois Legislature's classification of marijuana under its Narcotic Drug Act, which provided a mandatory ten-year sentence for a first conviction for sale of marijuana, rather than under its Drug Abuse Control Act, which specified a one-year penalty for a first conviction for sale of similarly dangerous drugs, violated equal protection. The court carefully pointed out that the defendant did not contest the power of

Illinois to prohibit the possession of marijuana. The case hardly reached the "opposite result from the Hawaii Supreme Court" as Petitioners state on page 6 of their brief.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Dated, Honolulu, Hawaii,
September 20, 1972.

Respectfully submitted,

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1971

No. 71-1558

PAUL LORIN KANTNER, CLAUDE ERNEST WINTER
and DAVID ALLEN NOWELL, *Petitioners*

vs.

STATE OF HAWAII, *Respondent*

ON PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of Hawaii

BRIEF FOR THE RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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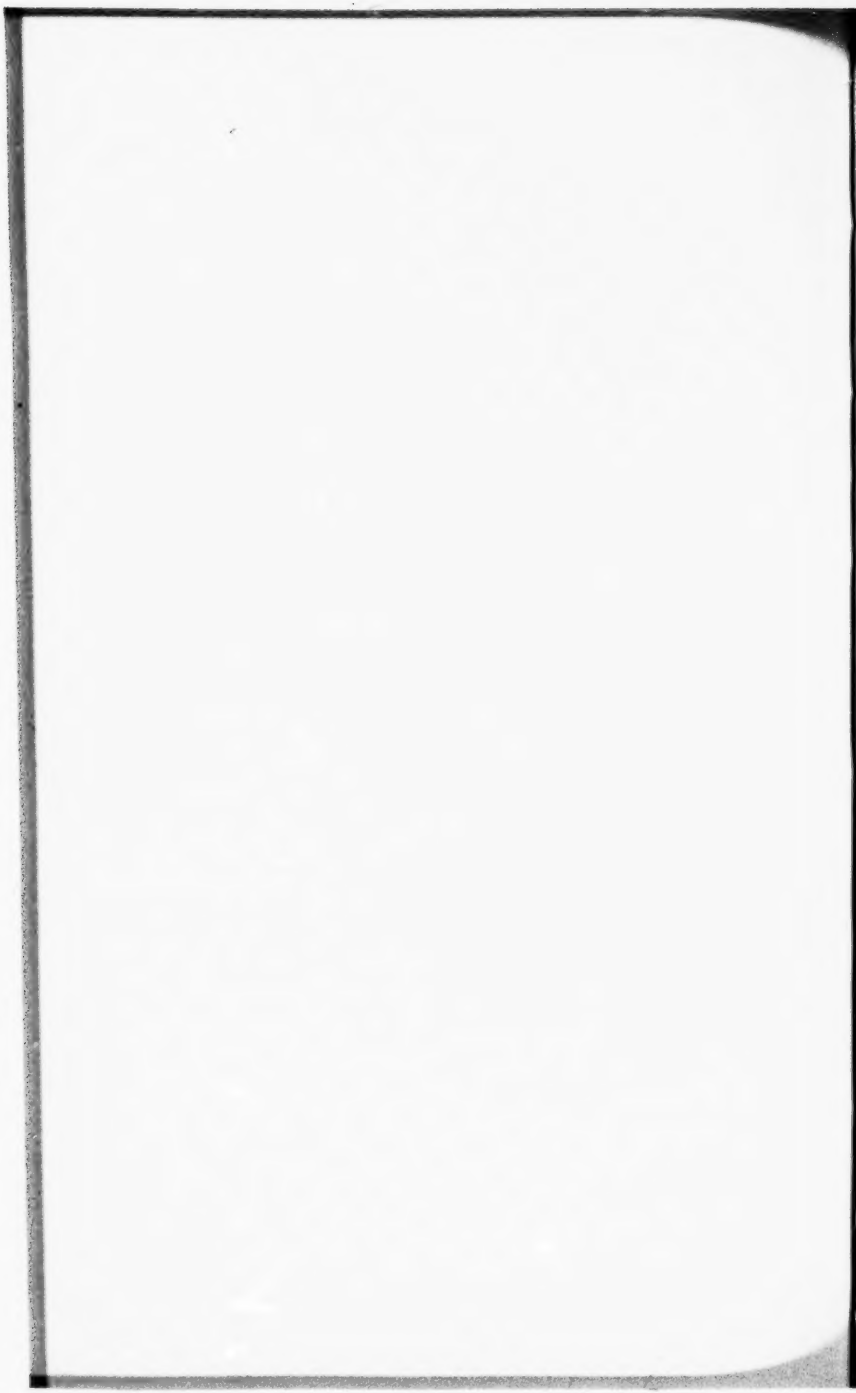

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In the Supreme Court
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PAUL LORIN KANTNER, CLAUDE ERNEST WINTER and DAVID ALLEN NOWELL, *Petitioners*

vs.

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ON PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of Hawaii

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Supreme Court of Hawaii is reported at 493 P.2d 306 and is set out in Appendix A of the Petition together with a copy of the order denying rehearing entered on February 25, 1972 (Appendix B of the Petition) and the order denying amended petition for rehearing and motion to stay issuance of the mandate entered on April 10, 1972 (Appendix C of the Petition).

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

Whether the provisions of Section 329-5 Hawaii Revised Statutes, as amended, prohibiting the private possession of marijuana meet the Due Process minimum requirement of "reasonableness."

Whether Section 329-5 Hawaii Revised Statutes, as amended, must meet the Due Process requirement of "compelling state interest" because the statute prohibits the exercise of a fundamental liberty guaranteed to petitioners, the "right to smoke marijuana."

Whether Sections 329-1 and 329-5 Hawaii Revised Statutes, as amended, meet the Equal Protection minimum requirement of "rationality" in the statutory classification and treatment of marijuana as a "narcotic."

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment 14.

Hawaii Revised Statutes, Sections 329-1 and 329-5, as amended, as set out on pages 3 and 4 of the Petition.

STATEMENT OF THE CASE

We concur in Petitioners' statement of the case with the following exceptions: 1) we do not concur in Petitioners' summary of the evidentiary hearing held in the First Circuit Court of Hawaii, and 2) we do not agree with Petitioners that the Illinois Supreme Court in *People v. McCabe, infra,* and *People v. Hudson, infra,* reached a conclusion opposite to that reached by the Hawaii Supreme Court below.

REASONS FOR DENYING THE WRIT

I.

INTRODUCTION

The State opposes the granting of the Petition for Writ of Certiorari in this case.

Petitioner Kantner was convicted for possession of marijuana. The trial court treated the conviction as a misdemeanor and sentenced Petitioner to pay a $150 fine under the provisions of Section 329-5, Hawaii Revised Statutes (H.R.S.), as amended. Petitioners Nowell and Winter were subjected to revocation of probation for possession of marijuana in violation of H.R.S. 329-5, as amended. Petitioners contend that the penalties they have suffered under Hawaii's statutory scheme that classifies and regulates marijuana as a "narcotic" have violated their federal constitutional rights to Due Process and Equal Protection of the law.

Although Petitioners' statement of the question presented seems simple and straightforward, the question consists of a number of issues not explicitly obvious and not clearly delineated in Petitioners' argument. We have rephrased the issue presented by Petitioners into three issues which Petitioners' arguments seem to imply are included in the broad issue stated in their Petition. We oppose certiorari because, on all the issues that we believe are properly raised by Petitioners, the reasoning of Chief Justice Richardson in the Hawaii Supreme Court opinion below was clearly correct. Also, we find the decision below consistent with cases like *People v. Sinclair*, 387 Mich. 91, 194 N.W.2d 878 (1972); *People v. McCabe*, 49 Ill.2d 338, 275 N.E.2d 407 (1971); *People v. Hudson*, 50 Ill.2d 1, 276 N.E.2d 345 (1971), *cert. denied*, 40 U.S.L.W. 3412 (1972), and *English v. Miller*, 341 F.Supp. 714 (USDC E.D. Va. 1972), which appear, at first blush, to answer the question as phrased by Petitioners in the Petition in their favor.

II.

SECTION 329-5 HAWAII REVISED STATUTES, AS AMENDED, MEETS THE DUE PROCESS MINIMUM REQUIREMENT OF "REASONABLENESS."

Petitioner correctly states the minimum Due Process requirement that every law must seek to achieve a valid legislative object by reasonable means rationally related to a legitimate end. The "legitimate end" involved here is control of drug abuse. The "means" to achieve that end can be divided into three areas of inquiry which should be explored to determine the reasonableness of the means employed by the State of Hawaii: 1) the **classification** of marijuana as a "narcotic," 2) the **treatment** of marijuana by law in relation to the treatment of other drugs classified as "narcotic," and 3) the **prohibition** of the private possession of marijuana.

With respect to the first two areas, Petitioners' basic argument seems more akin to the equal protection aspects of Due Process which we would consider properly placed and argued wholly under the question of whether or not Petitioners' rights to Equal Protection of the law were violated.

The Court below does point out with respect to classification that no Due Process notice requirements are violated by the use of the word "narcotic" in reference to marijuana. pp. v-vi of Appendix A of the Petition.

With respect to prohibition of the private possession of marijuana, the argument under the minimum test of reasonableness discussed here would seem to be that made by Justice Kobayashi in his dissent in the opinion below. Justice Kobayashi weighed the presently incomplete scientific data about marijuana and its organized illicit trafficking against the problem of widespread disregard of the marijuana laws by the youth of the State and decided that the prohibition of private possession of marijuana was unreasonable since it continued "to make crimi-

nals out of and consequently alienate the youth of today." p. xxxiii of Appendix A of the Petition. While such logic is desirable and commendable, we believe such a weighing process must properly be made by the legislature and not the courts under the demands of Due Process, especially considering the facts that marijuana is a "mind-altering" drug used extensively throughout the country and much research into its long-term effects and short-term interaction in the body with other drugs is still necessary. We urge the Court in this case to decline, as it did in *Griswold, infra,* 381 U.S. at 481-82, to accept the invitation of *Lochner v. New York,* 198 U.S. 45 (1905), to "sit as a super-legislature to determine the wisdom, need and propriety of laws that touch economic problems, business affairs, or social conditions." See the opinion of Chief Justice Richardson below, p. x of Appendix A of the Petition.

III.

THE "RIGHT TO SMOKE MARIJUANA" DOES NOT EXIST AS A FUNDAMENTAL LIBERTY. SECTION 329-5, HAWAII REVISED STATUTES, AS AMENDED, NEED NOT MEET THE STRICT DUE PROCESS REQUIREMENT OF "COMPELLING STATE INTEREST."

Petitioner obliquely raises what we feel to be the most important issue in this case, the question of whether or not the "right to smoke marijuana" exists as a fundamental liberty. If such a right does exist as a fundamental liberty, the State must show a compelling interest for the prohibition of the private possession of marijuana.

Justice Levinson, in dissent, made as articulate a defense of the "right to smoke marijuana" position as we have read in any case. We feel, however, that Justice Levinson has clearly strained the holdings in *Griswold v. Connecticut,* 381 U.S. 479, 14 L.Ed.2d 510, 85 S.Ct. 1678 (1965) and *Stanley v. Georgia,* 394 U.S. 557,

22 L.Ed.2d 542, 89 S.Ct. 1243 (1969), far beyond their important but restricted scope. Those cases dealt with activities intimately connected with First Amendment liberties that went to the very core of our civil and political institutions and the fabric of ordered liberty. The "right to smoke marijuana" does not involve such fundamental issues. It would be extending the concept of the "right of privacy" considered in *Griswold* and *Stanley* far beyond the clear intentions of this Court to include therein the "right to smoke marijuana." We agree with Chief Justice Richardson's reasoning below: "Our reading of *Griswold v. Connecticut* . . . leads us to conclude, as did the court in *People v. Aguiar*, 257 Cal. App.2d. 597, 65 Cal.Rptr. 171, *cert. denied*, 393 U.S. 970 (1968), that there is no fundamental guarantee protecting the use and possession of euphoric drugs." pp. ix-x of Appendix A of the Petition. That being the case, this Court need not reach the issue of whether or not there exists a "compelling state interest." The State need only show that its regulatory scheme with respect to marijuana is reasonable and rational.

IV.

SECTIONS 329-1 AND 329-5, HAWAII REVISED STATUTES, AS AMENDED, MEET THE EQUAL PROTECTION MINIMUM REQUIREMENT OF "RATIONALITY."

Petitioners' Equal Protection argument has no merit. In *Sinclair*, *McCabe*, *Hudson*, and *Miller*, cited in the Introduction to the argument in this Brief in Opposition, marijuana was not only classified as a "narcotic" but also treated exactly the same as all the drugs defined as "narcotic." With respect to the mere classification of marijuana as a "narcotic," it is clear that the legislature of the State of Hawaii has broad powers to make such a classification. *State v. Johnston*, 51 Haw. 195, 456 P.2d 805 (1969); *New York Rapid Transit Corp. v. City of New York*, 303 U.S. 573, 578, 82 L.Ed.2d 1024, 58 S.Ct. 721 (1968);

Continental Baking Co. v. Woodring, 286 U.S. 352, 371, 76 L.Ed. 1155, 52 S.Ct. 595 (1932). *Sinclair, supra,* and *McCabe, supra,* especially, held that marijuana is not a "narcotic" scientifically defined, is less harmful than "narcotics" scientifically defined, and should therefore be treated less harshly than "narcotics" scientifically defined. It is abundantly clear from a reading of these cases that the courts, in overturning their States' respective laws prohibiting possession and sale of a small amount of marijuana, were repulsed by the unduly heavy penalties involved. We do not agree with the Equal Protection arguments made in those cases under the old Narcotic Drug Act, but this Court need not confront the issue. In Hawaii, marijuana possession is treated differently from and less harshly than the possession of other drugs defined as "narcotic." Under H.R.S. 329-5, as amended, a first conviction for possession of "narcotics" bears a five year penalty while possession of marijuana can be treated as a misdemeanor or a felony, with a possible five year sentence, at the discretion of the trial judge. Petitioner Kantner's conviction was treated as a misdemeanor. Only a misdemeanor conviction for possession of marijuana is before this Court. *See* the opinion below, p. vi of Appendix A of the Petition. Hawaii's legislative scheme embodied in H.R.S. 329-5, as amended, would meet even the strict tests of "rationality" imposed by the *Sinclair, McCabe, Hudson,* and *Miller* courts. There is no substantial issue of Equal Protection raised by the facts in this case.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari in this case be denied.

Respectfully submitted,

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September, 1972